MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 23-302-86
ABDUL MALEK J
7 OCTOBER 1989

Civil Procedure — Whether affidavit verifies claim in accordance with O 14 r 2(1) — Whether incomplete jurat contravenes O 14 r 1(7) and procedurally defective — Whether there was inordinate delay in filing application for summary judgment — Rule of the High Court 1980, O 14 rr 1(7) & 2(1)

Contract — Guarantee — Whether principal debtor clause eliminates requirement of formal demand for payment — Whether valid demand made in the absence of AR card for registered letter of demand — Memorandum of deposit — Effect of certificate as to liabilities — Whether there was failure of fiduciary duty in relation to shares held

Summary judgment was ordered by the senior assistant registrar against the first defendant for sums due under a loan agreement with the plaintiff and against the second, third and fourth defendants as guarantors for the same. The defendants appealed against the decision and contended that: (a) the plaintiff's supporting affidavit was defective as it did not verify at all the facts on which the claim was based and therefore did not comply with O 14 r 2(1) of the Rules of the High Court 1980 ('the Rules'); (b) the jurat of the aforesaid affidavit was procedurally defective as it had not been completed in accordance with O 14 r 1(7) of the Rules; (c) there had been inordinate delay by the plaintiff in filing the application for summary judgment; and (d) there were serious questions of law to be tried, namely, (i) there had been no proper demand on the guarantors; (ii) the amount actually borrowed and owed were disputed; and (iii) the plaintiff had failed in their fiduciary duty by negligently failing to promptly dispose of the shares held by them despite the demands of the first defendant to reduce the debt due.

Held, allowing the appeal of the second defendant only:

(1) The supporting affidavit gave very specific details of the plaintiff's claim and more than satisfied the requirement of O 14 r 2(1).

(2) Although the deponent's name was missing from the jurat, this was stated at the beginning of the affidavit and any doubt as to the deponent's identity was eliminated by the Commissioner of Oaths duly attesting to his signature.

(3) The question of inordinate delay for an O 14 application lies at the discretion of the trial judge having considered the explanation given by the plaintiff for the lapse of time taken after the writ or defence was filed. The delay of five months and 21 days after the filing of the defence was not inordinate in this case.

(4) Despite the existence of the principal debtor clause in the guarantee, a formal demand on the guarantors for payment was still necessary.

(5) The letters of demand to the second, third and fourth defendants were valid as they had been sent to them individually by registered post in accordance with s 7.06 of the guarantee. However, in the absence of the AR card for the letter to the second defendant, it has to be found that he was not served with the same.

(6) The certificate of the plaintiff as to the liabilities of the defendants, provided pursuant to cl 11 of the memorandum of deposit, was valid.

(7) There was no failure by the plaintiff in their fiduciary duty to the first defendant in relation to the shares held.

(8) There was no evidence to support the contention of the second, third and fourth defendants that they were liable for a lesser amount than that claimed by the plaintiff.

[*Editorial Note*: The first, third and fourth defendants have appealed to the Supreme Court vide Civil Appeal No 03-111 of 1989.]

Cases referred to

1 *May* v *Chidley & Anor* [1894] 1 QB 451 (refd)
2 *Public Bank Bhd* v *Malamaju Enterprise Sdn Bhd & Ors* [1989] 2 MLJ 112 (refd)
3 *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (refd)
4 *Societe Des Etains De Bayas Tudjuh* v *Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (refd)
5 *Tractors Malaysia Bhd* v *Joseph Thambirajah & Anor* [1986] 2 CLJ 72 (refd)
6 *K & N Kenanga Sdn Bhd* v *Latchuman Dass s/o Shewaram* [1986] 2 CLJ 136 (cited)
7 *Comptroller-General of Inland Revenue, Malaysia* v *Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 (refd)
8 *McLardy* v *Slateum* (1890) 24 QBD 504 (refd)
9 *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (distd)
10 *Credit Corp (M) Bhd* v *Choi Sang & Anor* [1989] 1 CLJ 1070 (not folld)
11 *Kwong Yik Bank Bhd* v *Transbuilder Sdn Bhd & Ors* [1989] 2 MLJ 301 (not folld)
12 *Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashid* v *Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (refd)
13 *Dobbs* v *National Bank of Australasia Ltd* (1935) 53 CLR 643 (folld)
14 *Warner* v *Jacob* (1882) 20 ChD 220 (refd)
15 *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd* [1971] Ch 949 (refd)
16 *Colson* v *Williams* (1889) 58 LJ 539 (refd)
17 *In Re McMurdo; Penfield* v *McMurdo* [1902] 2 Ch 684 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 rr 1(7), 2(1)

Kenny WF Chai (*Nik Aliena Salwanee (Ms)* with him) for the plaintiffs.

Ng Poh Tat for the defendants.

Cur Adv Vult

Abdul Malek J: The learned senior assistant registrar had ordered final judgment in favour of the plaintiff against all four defendants on 25 November 1988 for the sum of $4,000,000 as at 1 April 1986 together with interest at the rate of 16.5% pa on that amount with effect from 2 April 1986 to the date of satisfaction and costs. It is against this decision that the four defendants have now appealed.

Basically, the submissions advanced by learned counsel for the defendants to support their contention why their appeal should be allowed can be categorized into four main issues, namely:

(a) that the plaintiff's affidavit supporting their application for summary judgment is defective as it did not

verify at all the facts on which the claim is based and therefore did not comply with O 14 r 2(1) of the Rules of the High Court 1980 (hereinafter 'the Rules');

(b) that the same affidavit contains a procedural defect as the jurat had not been completed in contravention of O 14 r 1(7) of the Rules;

(c) that there had been an inordinate delay on the part of the plaintiff in filing the application for summary judgment; and

(d) that there are serious questions of law and fact to be tried on the following points:

(i) that there had been no proper demand on the second, third and fourth defendants who are the guarantors;

(ii) that there is a dispute as to the actual amount borrowed and the actual amount owed; and

(iii) that the plaintiff had failed in their fiduciary duty by negligently failing to dispose of the said shares promptly in spite of demands and requests made by the first defendant to reduce the debt due to the plaintiff with a view of eventual settlement.

As to the verification of the facts on which the claim is based, I have perused the affidavit of the credit manager of the plaintiff which details the facts of the first defendant having taken a loan on 10 October 1986 from the plaintiff, the fact that they had failed to pay the sums due and owing despite the plaintiff's repeated demands, and the fact that the second, third and fourth defendants had stood as guarantors for the first defendant and they too had not made the payments despite the demands made by the plaintiff. The relevant loan and guarantee agreements, the letters of demand and the relevant statements of accounts had also been duly exhibited. Consequently, I fail to see how the application can be considered defective and wanting in the circumstances. Although the case of *May* v *Chidley & Anor*[1] had declared that the verification of the cause of action in the affidavit may be made in general terms, I am of the considered view that the plaintiff here was on a stronger footing as he had satisfied more than the requirement of O 14 r 2(1) of the Rules by giving very specific details.

As for the jurat, one look at it suffices to dismiss learned counsel for the defendants' objection on this defect. Only the deponent's name is missing but the fact that the Commissioner of Oaths had duly attested to the deponent's signature eliminates any doubt as to the identity of the deponent, whose name has in any case already been stated at the beginning of the affidavit.

Next comes the question of inordinate delay. The defendants had entered appearance on 7 October 1986 but had requested the plaintiff for time up to 15 December 1986 to settle the debts. The application for summary judgment was filed on 21 April 1987 and so the delay was only four months and six days from the expiry of the grace period to settle and five months and 21 days if calculated from the date the statement of defence was filed on 31 October 1986. In *Public Bank Bhd* v *Malamaju Enterprise Sdn Bhd & Ors*,[2] I had held that filing the application for summary judgment 16 months after the defence was filed was not an inordinate delay in the light of the absence of any merits in the statement of defence.

The Supreme Court in *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd*[3] had propounded that an application for O 14 judgment must be made after an appearance had been entered and it could be made either before or after the delivery of defence provided that where it was made after delivery of defence, the plaintiff must explain the delay. The case of *Societe Des Estains De Bayas Tudjuh* v *Woh Heng Mining Kongsi*[4] held that the intention of the Rules was that the application for summary judgment should be made before a defence had been delivered in ordinary course but a plaintiff was not precluded from making it afterwards; but the onus was on him to show why he did not apply sooner.

In *Tractors Malaysia Bhd* v *Joseph Thambirajah & Anor*,[5] the application for summary judgment had been filed nearly two years after the filing of the writ and almost one year after the defence of the first defendant had been filed. Following the *Societe* case,[4] the learned judge held that the court had the power to enter summary judgment against the first defendant even though a defence had been filed and the plaintiff took some time to file the O 14 application. However, the same judge had, some nine months later in *K & N Kenanga Sdn Bhd* v *Latchuman Dass s/o Shewaram*,[6] held that there was clearly an inordinate delay by the plaintiff when the O 14 application was filed 12 months after the defence was delivered as the plaintiff had failed to give any acceptable explanation for the delay.

To my mind, the question of inordinate delay for an O 14 application lies at the discretion of the trial judge having considered the explanation given by the plaintiff for the lapse of time taken after the writ or the statement of defence was filed. In *Comptroller General of Inland Revenue Malaysia* v *Weng Lok Mining Co Ltd*,[7] for instance, the court was of the opinion that a three-month delay was not inordinate after accepting the reasons given by the plaintiff. Again, in *McLardy* v *Slateum*,[8] which was decided about 100 years ago, a one-month delay was found to be reasonable and no explanation was needed for the delay. In the circumstances, I was of the view that the five months and 21 days' lapse was not inordinate in this case, especially so when after the grace period to settle, the time lapse was actually only four months and six days.

I shall now deal with the question of demand. Section 15.01 of the loan agreement entered into by the plaintiff with the first defendant states that: 'Any demand for payment of the moneys ... shall be in writing ... to the

defendant's address at the 1st Floor, Wisma Wan Mohamed, Jalan Kelab, Ipoh, Perak' and '... shall be sufficiently served if sent by registered post addressed or delivered at their respective addresses herein stated or to their respective last known addresses ...'. Similarly, under the guarantee agreement between the plaintiff and the second, third and fourth defendants, s 2.02 states: 'If and whenever the borrower shall make default in the payment of the moneys due and payable to the lender we shall on demand ...'. This is preceded by s 2.01 which states that 'We hereby jointly and severally irrevocably and unconditionally guarantee as principal debtors and not merely as sureties the repayment ...' Also, under s 7.06 '... any notice, demand or request ... shall be in writing ... by sending the same by registered post ... at our respective addresses ... or delivered by hand to us personally for that purpose at our last known place of residence ...'.

In the instant case, attached to the plaintiff's affidavit in support of their application for summary judgment against the four defendants are the letters of demand dated 14 April 1986, one to the first defendant with carbon copies to the second, third and fourth defendants as guarantors and another jointly addressed to the second, third and fourth defendants but sent separately. All four letters are attached to the individually addressed letter to each defendant as regards the statement of accounts certified as of 1 April 1986. However, only the AR cards to the first, third and fourth defendants had been exhibited, all dated 16 April 1986.

In *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd*,[9] the Supreme Court had rejected the validity of letters of demands sent to the guarantors by way of carbon copies of the letter of demand sent to the principal borrower. These facts are clearly distinguishable here as apart from the second, third and fourth defendants receiving carbon copies of the letter of demand addressed to the first defendant, they had each received their own letter of demand separately.

Two High Court decisions have been cited in the course of submissions as to whether a demand is a prerequisite to a claim to a guarantor who is in the position of a principal debtor and not merely as surety. The principle laid down in *Credit Corp (M) Bhd* v *Choi Sang & Anor*[10] was that:

> The law on the effect of the presence of a principal debtor clause in a guarantee is clear in that it obviates the necessity of a creditor to make a demand. The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. Where a guarantee contains both a written demand clause and a principal debtor clause, the latter overrides the condition precedent of a written demand.

The second is *Kwong Yik Bank Bhd* v *Transbuilder Sdn Bhd & Ors*[11] where it was held that:

(i) the liability of a guarantor depends on the language of the instrument and the nature of the liability it creates;
(ii) the obligation of the third defendant was not a collateral promise to pay on demand if the primary debtor did not pay. The clause in question imposed primary and parallel obligation on the first defendant and all the guarantors to pay on demand all moneys owing to the bank. Clause 14 made each of the guarantors a principal debtor;
(iii) in these circumstances no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay;
(iv) in any event the letter dated the 18th of December 1982 was a demand on the third defendant as well as for all other directors of the company and the company itself.

However, an appeal by the third defendant, who had alleged that no demand had been made on him, was allowed by the Supreme Court on 12 August 1988. Unfortunately, there was no written judgment although the case has been reported in *YM Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashid* v *Kwong Yik Bank Bhd*.[12] In the circumstances, I was inclined to hold that a formal demand is still necessary despite the principal debtor clause in the guarantee. However, although I find that the letters of demand to the second, third and fourth defendants are valid as they had been sent to them individually by registered post, I have to find the second defendant not served with the letter of demand in the absence of the relevant AR card for his letter.

As to the validity of the statement of accounts, the plaintiff had referred the court to the memorandum of deposit (exh 'A' at encl 10) also on 10 October 1985 between the plaintiff and the first defendant where cl 11 reads:

> A certificate by an officer for the time being of the finance company as to the moneys and liabilities for the time being due to or incurred by the finance company from or on our behalf shall be conclusive and binding on us except manifest error.

The validity of this certificate, which has been attached to all the four letters of demand, had been made clear in *Dobbs* v *National Bank of Australasia Ltd*[13] and subsequently followed in several cases in this country. *Dobbs'* case[13] had enunciated that:

> But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank.
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> ...
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> That the clause was not contrary to public policy as ousting the jurisdiction of the court, and, therefore, was not void; that a certificate given pursuant to the clause was conclusive upon the parties of the amount and existence of the principal debtor's indebteness.

As for the alleged plaintiff's failure in their fiduciary duty to the first defendant, I was again referred to the memorandum of deposit at cl 10 which reads:

> And we hereby undertake to ratify all acts and deeds carried out by the finance company in furtherance of this power of attorney and we hereby declare that the attorney(s) shall not be held responsible or liable to us for any loss or damage howsoever and whatsoever arising as a result of any act neglect or omission of the attorney in the execution of the power under this instrument and any matter or thing in relation thereto and we shall keep the attorney(s) indemnified against all costs expenses and charges which the attorney(s) may incur in the exercise of the powers aforesaid.

In *Warner* v *Jacob*[14] it was held that:

> If a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

In *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd*[15] the court's view was:

> There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it.

Again, in *Colson* v *Williams*,[16] the court found that:

> A power of sale in a mortgage deed is to be regarded as limiting the exercise of the rights of legal ownership of the mortgaged property, and at the same time as enabling the mortgagee to realize his security; and as the mortgagee is the sole judge of what is necessary to enable him to realize, his motives in exercising the power will not be regarded by the court, and so long as he does all that he fairly can do to obtain a fair price, as a prudent owner including to sell for his own advantage and to the best of his judgment, he will come under no liability to the mortgagor or puisne incumbrancer.

These authorities, in fact, also shatter the points raised by the defendants in their amended defence and counterclaim. Also, in *In re McMurdo; Penfield* v *McMurdo*[17] it was decided that:

> A mortgagee holding shares is not bound, as mortgagee, to be looking about for every turn of the market to see whether he can sell, nor is he bound to sell at the highest price the market can give.

There is only probably one other point that merits mention and that is the second, third and fourth defendants contend that they are only liable up to the amount of $1,000,000 and not $5,000,000. Since the loan agreements and guarantee state otherwise, and as there is no evidence to support this contention, I found no favour in this argument. The fact that the second, third and fourth defendants had initialled each page of the guarantee agreement, and that in their affidavits had not given details of any variation to that agreement or of any misrepresentation by any officer of the plaintiff, only strengthens my view that this is just a bare assertion in the circumstances.

Having reviewed the arguments advanced, I was of the view that the appeal by the defendants ought to be dismissed with costs except for the appeal by the second defendant which I had to allow purely on my finding that there was no concrete proof that the letter of demand had actually reached him.

Appeal of second defendant allowed.

Solicitors: *Cheang & Ariff; Henry Lim & Co.*

Reported by *Michele Rasanayagam*

Government of Malaysia v Teoh Chai Siok

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 21-01-88
KC VOHRAH J
4 OCTOBER 1989

Revenue Law — Recovery of additional tax and late payment increases — Nature of additional tax and late payment increases — Whether they amount to a debt and penalty — Whether limitation period applies for recovery of tax and penalty — Income Tax Act 1967, ss 103(4), (5A), 106(1) & 142(1) — Limitation Act 1953, s 6(1)(d) & (4)

Limitation — Nature of additional tax and late payment increases — Whether they amount to a debt and penalty — Whether limitation period applies for recovery of tax and penalty — Income Tax Act 1967, ss 103(4), (5A), 106(1) & 142(1) — Limitation Act 1953, s 6(1)(d) & (4)

The plaintiff claimed a sum of $333,400.33 being additional tax and late payment increases under the Income Tax Act 1967. The additional tax was assessed in 1975 and was disputed by the defendant. The defendant appealed unsuccessfully right up to the Judicial Committee of the Privy Council. The additional tax remained unpaid by the defendant even after the disposal of the appeal and on 20 May 1987, the defendant was sent a notification that late payment increases had been imposed and he was required to settle the additional tax and late payment increases. Summary judgment was obtained and the defendant appealed against the decision. The defendant alleged that: (1) the additional tax component had become a debt and was therefore barred from recovery under s 6(1)(d) of the Limitation Act 1953; and (2) the late payment increases were penalties and were barred from recovery under s 6(4) of the Limitation Act 1953.

Held, dismissing the appeal:

(1) The additional tax of $288,658.70 was clearly tax due and payable and may be recoverable by civil proceedings as a debt due under s 106 of the Income Tax Act 1967. Similarly, late payment increases are imposed under ss 103(4) and 103(5A) which state that the increased sum shall be recoverable as if it was a tax due and payable which would also fall under s 106 and may be recoverable as a debt.

(2) The word 'debt' in s 106(1) of the Income Tax Act 1967 does not change the complexion of the amount claimed; it is still